

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ORIGINAL  
FILE

PR Docket No. 92-119

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Revocation of License of  
SANDRA V. CRANE  
Amateur Radio Station N6TFO  
Marina Del Ray, California

and

Suspension of License of

SANDRA V. CRANE  
Amateur Extra Class  
Radio Operator License

and

Revocation of License of

CHARLES P. PASCAL  
Amateur Radio Station WB6CIY  
Carson City, Nevada

and

Suspension of License of

CHARLES P. PASCAL  
Amateur Extra Class  
Radio Operator License

To: Hon. Joseph Chachkin  
Administrative Law Judge

**MEMORANDUM IN SUPPORT OF OBJECTION TO ADMISSION  
OF TESTIMONY FROM CHRISTINE MCELWAIN**

Sandra V. Crane and Charles P. Pascal ("Respondents") by their counsel submit this memorandum in support of their objections -- to be made at the September 18, 1992 prehearing conference -- to the admission of the testimony of Christine McElwain and an alleged transcript of a tape recording made by her. In support, the following is shown:

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I. Statement of facts.

1. In this proceeding, the Private Radio Bureau is attempting to revoke the licenses of the Respondents based on the allegations that they have assisted individuals to procure amateur radio licenses by fraud. The chief witness against the respondents is Ms. McElwain. Ms. McElwain was recruited to be an undercover operative by Mr. David Morse, former Official Observer Coordinator for the ARRL Amateur Auxiliary program for the Los Angeles area, who informed her that the Amateur Auxiliary was investigating the California Amateur Radio School ("CARS") run by the Respondents. Mr. Morse testified in his deposition in this proceeding that the Amateur Auxiliary conducted this enforcement operation after obtaining permission and advice of the FCC's Private Radio Bureau, Special Services Division. See Exhibit A, pp. 13, 15, 17, 20, 27, 29, 30, 31, 36, 48, 49, 50, 51, 52.<sup>1/</sup>

2. In the course of Ms. McElwain's investigation of the school, she attended one class session and a test session held on August 4, 1991; a portion of a class held on August 24, 1991 and a portion of the test session held after that class; and a portion of a test session held after a class on September 14, 1991. She has offered testimony of alleged irregularities occurring during those classes and test sessions. See Bureau

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<sup>1/</sup> Mr. Morse was apparently assisted by Mr. Fred Ordway in this matter. See Bureau's Answer to Interrogatories, para. 8 (July 20, 1991). The obvious conflict of interest of Mr. Ordway's participation in investigating her former employer apparently does not bother the Bureau. Mr. Ordway, who is now the Los Angeles area Official Observer Coordinator had been fired as a teacher at CARS previously.

Direct Case at Affidavit of Christine McElwain. The Bureau has also offered a partial transcript of a tape recording Ms. McElwain surreptitiously made of the September 14, 1991 test session she attended. This memorandum will demonstrate that neither Ms. McElwain's testimony, nor the tape transcript should be admitted into evidence.

**II. Ms. McElwain's participation in an enforcement action violates the Communications Act.**

3. Ms. McElwain's testimony must be rejected because it arises from her conduct of an enforcement action in violation of the Communications Act. In 1982, Congress passed the Communications Amendments Act of 1982, PL 97-259. Among the amendments to the act was a provision, 47 U.S.C. Section 154(f)(4)(C)(i), designed to allow amateur radio operators to monitor amateur radio transmissions to detect improper or interfering transmissions and to report such information to the proper Commission personnel.

4. 47 U.S.C. Section 154(f)(4)(C)(i)(I) allows the Commission:

for purposes of monitoring violations of any provision of this chapter (and of any regulation prescribed by the Commission under this chapter) relating to the amateur radio service [to] recruit and train any individual licensed by the Commission to operate an amateur station; and accept and employ the voluntary and uncompensated services of such individual.

(Emphasis Added.) In addition, 47 U.S.C. Section 154(f)(4)(C)(i)(III) provides that:

The functions of individuals recruited and trained under this subparagraph shall be limited to --

- (I) the detection of improper amateur radio transmissions;
- (II) the conveyance to Commission personnel of information which is essential to the enforcement of this chapter (or regulations prescribed by the Commission under this chapter) relating to the amateur radio service; and
- (III) issuing advisory notices, under the general direction of the Commission, to person who apparently have violated any provision of this chapter (or regulations prescribed by the Commission under this chapter) relating to the amateur radio service.

And to make this point clear, the provision goes on to state:

Nothing in this clause shall be construed to grant individuals recruited and trained under this subparagraph any authority to issue sanctions to violators or to take any enforcement action other than any action which the Commission may prescribe by rule.

5. The legislative history of this provision makes it clear that Congress was authorizing the use of amateur volunteers solely to monitor for improper or interfering transmissions. See 3 U.S. Code Congressional & Admin. News (1982), p. 2237 (Senate Report No. 97-191) (copy attached as Exhibit B). In reviewing the purposes of the amendment, the Senate Report stated that the legislation was designed to allow "the FCC to utilize volunteer licensed amateur radio operators for the purpose of monitoring unlicensed radio stations operating in the amateur bands, or amateur stations operating in violation of amateur rules." Id. at 2238.

6. The limit on use of amateur volunteers is important because the provision Congress enacted was designed to write a

limited exception into the Act for the Commission to use licensed volunteers. As the Senate Report explains, in 1905 Congress enacted 31 U.S.C. Section 665, subsection (b) of which prohibits any "officer or employee of the United States [from accepting] voluntary service for the United States or employ[ing the] personal service [of another] in excess of that authorized by law, except in cases of emergency ...."<sup>2/</sup> Thus, the 1982 amendments were designed to authorize in a limited circumstance

the Commission['s use of] volunteer licensed amateurs ... to assist in detection, location and monitoring of illegal operators and interference phenomena on the amateur bands ... Armed with information obtained from amateur volunteers, FCC personnel can proceed right to the source of the problems, monitor at the predicted times, and gather evidence much faster than would otherwise be possible.<sup>3/</sup>

7. In carving out a specific and limited exception to the general prohibition against accepting the voluntary services of individuals (except in emergency situations), Section 154(f)(4)(C)'s provisions must be strictly limited to the purpose Congress intended. That purpose is the detection of improper or interfering transmissions. Nothing in the Act authorizes the Commission to accept the volunteer services of an amateur participating in a sting operation of a radio school. Thus the placing of Ms. McElwain as an undercover operative in CARS was in violation of the Act. Indeed, as the text of the Act shows, the

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<sup>2/</sup> That provision is now codified as 31 U.S.C. Section 1342.

<sup>3/</sup> U.S. Code, Congressional and Admin. News, p. 2242.

law specifically prohibits participation of volunteers in enforcement efforts.

8. Moreover, even if the Act did not limit participation to monitoring for unlawful or interfering transmissions, and even if the Act did not prohibit the use of a volunteer in an enforcement operation, Ms. McElwain's participation would still have been in violation of the Act because she had not been trained to participate as a volunteer pursuant to the requirements of the statute. Since Congress prohibits the Commission from either employing or accepting the services of an amateur operator for any purposes other than monitoring for unlawful transmissions, the "sting" operation Ms. McElwain participated in was a rogue operation.

9. Reference to the Commission's implementation of the 1982 amendments confirms the above conclusions. In 1984, the Commission's Field Operations Bureau ("FOB") and the American Radio Relay League ("ARRL") entered into a cooperative agreement to implement Section 154(f)(4)(C)'s provisions. A copy of that agreement is attached as Appendix A to Exhibit C. That agreement is clearly directed to use of ARRL's Amateur Auxiliary personnel to monitor for and report as appropriate unlawful transmissions. See generally Exhibit C, Attachment A Section 2. Moreover, the agreement specifically provides that

All prospective members of the Amateur Auxiliary will be required to undergo a training and certification procedure administrated by ARRL, and successful completion of such training/certification will be required for enrollment.

Id. at Section 5.

10. Furthermore, the ARRL's Training Guide for the Amateur Auxiliary to the FCC's Field Operations Bureau (1988) (attached as Exhibit C)<sup>4/</sup> also makes it clear that the Amateur Auxiliary's role is one of monitoring for over the air transmission violations. Id. at 1.1-1.3.

11. In sum, Ms. McElwain was recruited for and participated in a purported Amateur Auxiliary sting operation targeting CARS. She was not a member of the Amateur Auxiliary and has no training pursuant to that program, despite the specific training requirements contained in the FOB-ARRL agreement establishing the Amateur Auxiliary. Neither the FOB-ARRL agreement, nor the underlying statute, authorized the type of activity which Mr. Morse and the FCC put Ms. McElwain up to. In fact, the Act prohibited the Commission from using untrained volunteers period, the Act prohibits using any volunteers in an enforcement action, and the Act limits the use of volunteers to monitoring for unlawful or interfering radio transmissions after appropriate training.

12. Under the law, the Commission cannot use the services of volunteers, except as the law otherwise allows. In employing Ms. McElwain, through the Amateur Auxiliary program, to

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<sup>4/</sup> Appendices B-D are omitted.

participate in the sting operation of CARS, the Bureau and Mr. Morse, as well as the Amateur Auxiliary, have violated express limitations in the Act relating to enforcement efforts and the extent to which non Commission personnel may be involved in investigatory activities. Admitting Ms. McElwain's testimony concerning her illegal enforcement activities would be an even further violation of the Act because the Commission would be continuing to accept Ms. McElwain's services despite the express provisions of the Act outlawing such conduct. For that reason and to remove any further incentive for violation of this provision of the Act by either the Amateur Auxiliary or FCC personnel, Ms. McElwain's testimony should not be admitted.

**III. Ms. McElwain's taping of the September 14, 1991 testing session must be suppressed as a violation of California law.**

13. In addition to the foregoing ground for rejection of Ms. McElwain's testimony, the alleged transcription of the September 14, 1991 testing session must be rejected because the tape recording at issue was made in violation of California criminal law. Ms. McElwain's deposition indicates that she took a tape recorder to the September 14, 1991 testing session where she took a Novice Morse Code examination.

14. Section 632(a) of the California Penal Code makes it a crime for any person to intentionally, without consent of all parties to a confidential communication, record such a communication. (Copy attached as Exhibit D.) Section 632(c) defines a confidential communication as any communication carried on in such circumstance as may reasonably indicate to any party



to such communication that it is to be confined to such parties. It excludes a public gathering where the parties may reasonably expect that the communications may be overheard or recorded. The CARS class session and the test session following are clearly not public gatherings where the parties would expect themselves to be tape recorded or overheard by others. As such their communications were confidential under California law. Section 632(d) provides that evidence obtained in violation of that statute may not be used in any judicial, administrative, legislative or other proceeding, except as proof in a prosecution for a violation of the statute itself. Accordingly, the transcript recording offered by the Bureau of the September 14, 1991 session may not be admitted in this proceeding.

#### **IV. Conclusion.**

15. The discussion above shows clearly that the "sting" operation carried out against the Respondents violated both the Communications Act and the California Penal Code. As such the testimony of Ms. McElwain, and the alleged transcript of the tape recording Ms. McElwain made of the September 14, 1991 session, which is the fruit of that illegal conduct, cannot be admitted into evidence in this proceeding. Accordingly, Respondents


request the presiding judge to sustain the objections to this evidence they will make.

Respectfully submitted,

CHARLES P. PASCAL

SANDRA CRANE

By



George L. Lyon, Jr.  
Their Counsel

Lukas, McGowan, Nace and Gutierrez, Chartered  
1819 H Street, N.W., 7th Floor  
Washington, D.C. 20006

(202) 857-3500

Martin J. Barab  
Of Counsel to Sandra Crane  
9606 Santa Monica Blvd., 3rd Floor  
Beverly Hills, CA 90210

(310) 859-6644

September 17, 1992

**EXHIBIT A**

1           A           Maia had forwarded a copy to me. I'm not sure  
2 if it went through other routes, but it did finally get to  
3 me, Sfair's letter.

4           Q           Did he give you any instructions as to what to  
5 do?

6           A           No.

7           Q           What did he tell you about Sfair's letter?  
8 Did you have a conversation with Mr. Maia regarding Sfair's  
9 letter?

10          A           No. At that point it was strictly a letter.

11          Q           Was there any recommendation or memoranda as  
12 to any further action on that letter as to what to do?

13          A           No.

14          Q           So what other complaints did you get against  
15 Sandra Crane aside from that one?

16          A           That was the one that led to action.

17          Q           What kind of action did this complaint lead  
18 to?

19          A           At that time I had decided to call the FCC,  
20 Tom Fitz-gibbon's office, let him know about the type of  
21 complaint that I had received, let him know about the letter  
22 from George Sfair, and ask them if we could send someone into  
23 the class who did not know these people, who was just a  
24 neutral party, to go investigate and see if anything, if  
25 there was any truth to the reports that we had received.

1 getting this fading problem.

2 MR. BARAB: Well, I don't know what to do. What do  
3 you suggest I do? Is it fading in and out now?

4 MR. FITZ-GIBBON: Yes. We're getting maybe 85 percent  
5 of the words.

6 MR. BARAB: All right. Tell me if you can't hear me.

7 MR. FITZ-GIBBON: Well, go on. If we have real  
8 trouble hearing something, we'll ask it to be repeated.

9 MR. BARAB: You mean you just didn't hear what I just  
10 said to you this minute?

11 MR. FITZ-GIBBON: Yes.

12 MR. BARAB: I said nothing. So maybe that's the  
13 reason.

14 Q You talked to Mr. Fitz-gibbon regarding  
15 conducting an independent investigation based upon some sort  
16 of anonymous complaints that you received plus one written  
17 complaint that Mr. Maia received; is that right?

18 A That is correct.

19 Q What did Mr. Fitz-gibbon tell you?

20 A Mr. Fitz-gibbon said that it would be okay to  
21 proceed with that type of investigation, but it would be  
22 considered an Amateur Auxiliary initiated investigation if we  
23 so choose to do it.

24 Q As opposed to a government sanctioned  
25 investigation?

1 testify. Therefore, there was no way to ascertain the  
2 accuracy.

3 Q And then you asked for permission to go  
4 forward, and he gave it to you?

5 A He gave me permission to initiate an official  
6 observer or an Amateur Auxiliary investigation. He said he  
7 would have no problem with that.

8 Q You told him you were going to send somebody  
9 undercover?

10 A That's correct.

11 Q Did you tell him you were going to tape it?

12 A No. We had no intention of taping it at that  
13 time.

14 Q Did you subsequently have the intention of  
15 taping it?

16 A Yes.

17 Q Did you tell Mr. Fitz-gibbon you were going to  
18 tape it?

19 A Yes.

20 Q Did he say it was all right?

21 A Yes.

22 Q How many people do you know who made  
23 complaints? The identity of whom you know?

24 A Can you repeat that again?

25 Q Yes. You said some people were anonymous that

1           MR. FITZ-GIBBON: It's not mainly the volume. It's  
2 that we're missing whole words.

3           MR. BARAB: Why don't you hang up, call me back, maybe  
4 get another line.

5           MR. FITZ-GIBBON: Okay. It's probably not the line,  
6 but I'll try again.

7                               (Brief recess.)

8 BY MR. BARAB:

9           Q           Mr. Morse, you spoke with Mr. Fitz-gibbon on  
10 the first of August by telephone --

11           A           I said approximately the First.

12           Q           Approximately.

13           A           Right.

14           Q           So it was your idea to initiate this  
15 investigation, was it not?

16           A           That's correct.

17           Q           Now, you function as what?

18           A           At that time it was official observer  
19 coordinator.

20           Q           Yes?

21           A           For Los Angeles.

22           Q           Yes?

23           A           A.R.R.L.

24           Q           Now, briefly they label this as an O.O.?

25           A           That's correct.

1           A           It's a private organization.

2           Q           That organization is divided into what? It's

3 state by state?

4           A           No. It's a national and international

5 organization.

6           Q           As an official observer coordinator, what are

7 your functions? What do you do? What are you supposed to

8 do?

9           A           The functions -- are you talking about

10 official observers in general, what's the role?

11          Q           Yes.

12          A           The Official Observer program was set up

13 originally when they pulled out federal dollars where the FCC

14 could not investigate things. The official observer program

15 or Amateur Auxiliary was set up to investigate and obtain

16 evidence that could be used by the FCC. We are not around to

17 enforce any rules, just obtain evidence.

18          Q           Obtain evidence for what?

19          A           For a violation of -- amateur-related

20 violations. Typically I believe it might say in article 97.

21          Q           Article 97 of what?

22          A           The Federal Communications Act.

23          Q           Do you know what that act stands for, what

24 that provides? Have you read that section?

25          A           Yes. It's a booklet.



1 Q What's your understanding of FCC 97?

2 A Well, it could take me a few hours to cover  
3 that subject.

4 Q So it's a bunch of rules and regulations  
5 regarding the conduct of --

6 A I'll supply you with a copy to look at.

7 Q You're showing me Rules and Regulations  
8 Amateur Radio FCC, fourth edition, August 19, '91.

9 A These are the most current rules.

10 Q These are the rules governing amateur radio  
11 service?

12 A That's correct.

13 Q Your understanding is the FCC used to regulate  
14 and police amateur radio, and then funding stopped, and  
15 somebody else has decided to do that on behalf of the FCC?

16 A Right.

17 Q Do you know whether or not the FCC has  
18 designated the type of violations that it has allowed the  
19 A.R.R.L. to investigate?

20 A No. As far as I know, there's no restriction  
21 on the types of violations.

22 Q Investigating schools is not a normal function  
23 of the A.R.R.L., is it?

24 A It is not the everyday norm to investigate  
25 schools.

1           Q           What would you say is the normal type of  
2 run-of-the-mill investigation?

3           A           The everyday normal investigation would be  
4 jamming, radio-to-radio jamming, general infringement,  
5 complaints of that sort.

6           Q           How about if somebody uses the air waves sort  
7 of illegally with obscenities, things of that nature?

8           A           We might get involved depending on what it  
9 was.

10          Q           How about people who are not licensed using  
11 the amateur radio service? Would that also be a situation  
12 that you would be involved?

13          A           Yes. We could be involved there.

14          Q           Has there been a standard as to how you are to  
15 conduct yourself with reference to violations and  
16 coordinating between the A.R.R.L. and the FCC?

17          A           Yes.

18          Q           Are those published?

19          A           They are published.

20          Q           Where are they published?

21          A           They're published in a booklet approximately  
22 like this booklet, I believe it has a blue cover, by the  
23 A.R.R.L.

24          Q           Do you have that book?

25          A           No. I have it at home. It's not here.

1       We cannot do that.

2               Q       Yes, but you determine if a problem is light  
3       or a problem is severe by your ability to talk to a licensee  
4       or a violator and say, "Listen. If you don't stop this,  
5       we're going to go to the FCC and yank your license."

6               A       I can't say that.

7               Q       Can you say, "We'll go to the FCC"?

8               A       Yes.

9               Q       And you give them a chance to comply before  
10      you finally go to the FCC?

11              A       We can do that.

12              Q       And you have done that?

13              A       We've done that.

14              Q       Have you done this in this case?

15              A       No, we have not done that.

16              Q       Who determined that this is a severe rather  
17      than a light problem?

18              A       Well, no one had made that determination from  
19      the start.

20              Q       Who made a determination that this is an FCC  
21      problem?

22              A       This became -- FCC became involved because  
23      this was such an unusual type of case for us that before we  
24      did any type of investigation we felt it imperative that we  
25      call Mr. Fitz-gibbon.

1 FCC. He is the FCC.

2 Q Have you heard on occasion from  
3 Mr. Fitz-gibbon, who is a liaison or represents the FCC, "You  
4 take care of it yourself. This is not really a matter or  
5 shouldn't be FCC"?

6 A He's used different verbiage.

7 Q Tell me the verbiage.

8 A "This is an Amateur Auxiliary initiated  
9 investigation."

10 Q Amateur?

11 A Auxiliary.

12 Q Yes?

13 A Initiated investigation.

14 Q As opposed to an FCC?

15 A He didn't say that. I just told you what he  
16 said.

17 Q He said about amateur --

18 A FCC did not initiate this investigation. I  
19 did.

20 Q I'm talking about this case.

21 A Yes. This particular investigation was  
22 initiated by myself and not the FCC.

23 Q I understand. Was it done with the purpose of  
24 going to the FCC with a complaint?

25 A That's correct.

1 Q Was it done with the knowledge of the FCC?

2 A Yes.

3 Q Was it done with the blessing of the FCC?

4 A They knew what we were doing, yes.

5 Q It was done pursuant to advice you received  
6 from the FCC?

7 A Yes.

8 Q Did Mr. Fitz-gibbon or anyone else at the FCC  
9 tell you what your limitations are, what you can do and what  
10 you cannot do as far as this investigation?

11 A Yes, he did.

12 Q What did he say to you?

13 A I should have some notes in here about that.

14 MR. FITZ-GIBBON: We're having trouble hearing here,  
15 or I'm having trouble hearing here. Eric isn't in the room.  
16 Could you repeat the answer to that question. I didn't hear  
17 it at all.

18 MR. BARAB: He hasn't answered it yet.

19 THE WITNESS: I haven't said anything.

20 MR. FITZ-GIBBON: I'm having trouble with most of the  
21 questions and answers there. We're missing a lot of words.  
22 There's something wrong, I think, with the speaker phone on  
23 that end. It's not picking everything up.

24 MR. BARAB: Well, we'll try to talk a little louder  
25 again.

1 MR. FITZ-GIBBON: It's not really the volume that's  
2 the problem.

3 (Brief discussion held off the record.)

4 THE WITNESS: I don't see the notes. I assumed they  
5 were in my file here.

6 He had instructed me though -- this is going  
7 from memory now -- that we cannot entrap them in any way.

8 BY MR. BARAB:

9 Q Did he tell you what entrapment is?

10 A I believe he did. We discussed that. That is  
11 we cannot put them in a position where we're trying to --  
12 we're trying to make something happen that might not normally  
13 happen. We had to go in as completely neutral people just  
14 observing.

15 Q All right.

16 A That was the gist of the conversation. There  
17 were a few other notes.

18 Q By that time you had already recruited  
19 Miss McElwain to be your spy?

20 A Yes, that's correct.

21 Q And you told him about that?

22 A Yes.

23 Q Did you talk about taping?

24 A No. There was no intention of taping when we  
25 first went in there. The first two times that Chris had gone

1       there was no taping.

2               Q       Did you ever discuss taping with  
3       Mr. Fitz-gibbon?

4               A       Yes, I did.

5               Q       What did he say about taping?

6               A       That that would be okay at the time that I  
7       discussed it which was after Chris had already gone two  
8       times.

9               Q       Did he say that she can have a secret  
10      microphone?

11              A       I didn't ask him that.

12              Q       So he gave you some sort of permission to tape  
13      the third session?

14              A       He said that would be okay.

15              Q       Did you ask him for permission to tape?

16              A       Yes.

17              Q       And he said it would be okay; right?

18              A       Yes, that's true.

19              Q       I asked you earlier if you had discretion to  
20      treat something as A.R.R.L. versus going to the FCC with it,  
21      to keep it purely within the auxiliary investigation as  
22      opposed to going official, and you said that you did have  
23      that discretion.

24              A       In most cases, yes. In this case, no.

25              Q       Why did you believe that this case did not

1 allow you the discretion to deal with it by yourself rather  
2 than going to the FCC?

3 A Because the FCC was already involved.  
4 Fred Maia had sent -- the original letter actual -- actually,  
5 there was a letter that went from Fred Maia to  
6 Tom Fitz-gibbon. So Tom was already involved and knew about  
7 the case, and I had called Tom for advice on how to proceed  
8 with that case.

9 Q This is the letter of July 11? This is the  
10 July 11 letter to FCC from the national auxiliary -- the  
11 national what?

12 A Yes. This is the original. You may have  
13 that copy of rules and regulations. I don't need that.

14 MR. BARAB: In evidence will be this letter, National  
15 Volunteer Examiners, Frederick O. Maia, dated July 11 to FCC,  
16 Federal Communication Commission. It will go as  
17 No. 1.

18 (Respondents' Exhibit No. 1 was marked  
19 for identification by the court reporter  
20 and is attached hereto.)

21 BY MR. BARAB:

22 Q Is this the letter that you're talking about?

23 A That is the letter.

24 Q Did you know about this letter of July 11,  
25 1991, when it went out?



**EXHIBIT B**